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Letter Ruling 05-4: Sales/Use Tax Liability of Commercial Real Estate Manager

May 24, 2005

You have requested a letter ruling on behalf of your client, ***** (the Company), regarding the application of the Massachusetts sales and use taxes relative to the procurement of goods and services from third party vendors necessary for the operation of commercial properties managed by the Company.

I. FACTS

The Company performs property management services for owners and occupiers of commercial real estate in Massachusetts. In this capacity the Company procures all goods and services necessary to operate the properties being managed from third party vendors. Such goods and services may include landscaping services, washroom supplies, and elevator maintenance services. These goods and services are provided directly to a specific client's property for immediate use on that property. They are not held as inventory of the Company for use at a later time. The Company does not take title to, or possession of, any goods provided by third party vendors. Typically purchase orders are prepared in the client name alone, client name/the Company, or client name c/o the Company. Invoices are billed to the parties in the same manner.

When the Company receives invoices from the third-party vendors, it presents them to the client for approval. All invoices include applicable sales or use tax. Once an invoice is approved, the client deposits funds into a segregated bank account from which the Company is authorized to withdraw funds to pay the invoice. The segregated bank accounts are intended to be "zero balance" accounts. The Company has the authority to withdraw funds from these accounts only after the invoices have been presented to and approved by the property owner and the appropriate funds transferred into the bank account. Although the Company is named on the bank account, per the Facilities Management Agreement it does not have the authority to withdraw any excess funds that may be present in the account if it has not received prior approval. The Company does not utilize its own funds to pay the vendors.

The third-party vendor determines the applicable sales or use tax for each invoice and adds that tax to the invoice total. The third-party vendor collects the tax when the full amount of the invoice is paid and remits it as part of its monthly sales/use tax return.

The Company does not charge or otherwise receive any sort of mark-up on the goods and services procured on behalf of the client. The Company is compensated through a monthly management fee. The management fee is not based in whole or in part on the percentage of the goods and services procured by the Company on behalf of its client.

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II. DISCUSSION

An excise is imposed upon retail sales in the Commonwealth by any vendor of tangible personal property at the rate of five percent of the vendor's gross receipts from such sales. G.L. c. 64H, § 2. A complementary use tax is imposed upon the storage, use or other consumption in the Commonwealth of tangible personal property purchased from any vendor for use within the Commonwealth at the rate of five percent of the sales price of the property. G.L. c. 64I, § 2. For purposes of the use tax, it is presumed that tangible personal property sold by any person for delivery in the Commonwealth is sold for storage, use or other consumption in the Commonwealth; the burden of proving the contrary is upon the person who makes the sale. G.L. c. 64I, § 8.

A sale includes "any transfer of title or possession, or both, exchange, barter, lease, rental, conditional or otherwise, of tangible personal property or the performance of services^[1] for a consideration, in any manner or by any means whatsoever." G.L. c. 64H, § 1. A taxable "use" generally consists of "the exercise of any right or power over tangible personal property incident to the ownership of that property..." G.L. c. 64I, § 1.

The Company's sales/use tax liabilities with respect to the above-described transactions must be premised upon a sale to or taxable use by it in the regular course of business. Under the facts as presented, no taxable sale to or use by the Company can be discerned. The Company does not provide the consideration for a taxable sale. Nor does it take title to or possession of the goods procured on behalf of its clients.

III. CONCLUSION

The appropriate sales/use tax has been collected from the Company's clients and remitted by the third party vendors. The Company does not take title to or possession of the goods procured on behalf of its clients and does not utilize its own funds to pay the vendors. Thus, we rule that the Company is not required to collect and remit sales/use tax with respect to the transactions described.

Very truly yours,

/s/Alan LeBovidge

Alan LeBovidge
Commissioner of Revenue

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^[1] The term "services" is limited to telecommunications services. G.L. c. 64H, § 1.